91-669

Supreme Court, U.S.
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Case No. _____

IN THE
Supreme Court of the United States
October Term, 1991

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

DAVID ALAN GORE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether review should be granted to allow this Court to decide the standard to be applied in determining the harmlessness of any violation of *Lockett v. Ohio,* 438 U.S. 586 (1978), and *Hitchcock v. Dugger,* 481 U.S. 393 (1987), an issue which the circuit court below declined to address based upon its recognition that conflicting standards for harmless error had been applied by the circuit court in its prior decisions and any attempt to "wrestle" with the issue would only result in further conflict.

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v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, rendered on May 29, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 933 F.2d 904 (11th Cir. 1991), and is reproduced in the Appendix to this pleading. [A5-A7][1]

The decision of the United States District Court for the Middle District of Florida is reported at 763 F.Supp. 1110, and is likewise reproduced in the Appendix to this pleading. [A8-A52].

The decision of the Florida Supreme Court, which denied relief as to the claim now at issue, is reported at 532 So.2d 1048 (Fla. 1988), and is also set forth in the Appendix. [A53-A60].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on May 29, 1991. The Petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 23, 1991, and Petitioner's timely Motion to Stay Mandate was granted on August 20, 1991; copies of these orders are reproduced in the Appendix to this pleading. [A1-A4]. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States of America are involved:

Amendment XIV, which provides, in pertinent part:

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1 [A___] represents a citation to the materials contained in the appendix to this pleading.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

On March 15, 1984, David Alan Gore was convicted of first degree murder, kidnapping and sexual battery in Pinellas County Circuit Court, in regard to the July 26, 1983 kidnapping and murder of seventeen year old Lynn Elliott, and the kidnapping and sexual batteries upon her fourteen year old companion, Regan Martin. After the guilty verdicts were announced, a charge conference for the penalty phase was conducted, at the conclusion of which the trial court inquired of the parties what evidence they intended to present during the penalty proceeding the following day. Defense counsel proffered that he would present several relatives to testify that, based on the discovery of a half-empty vodka bottle and prescription drugs in Gore's bedroom, their observations of Gore at the time of his arrest, and the tape of his confession taken immediately after his arrest, they believed Gore had been drinking when he committed the crimes. Defense counsel further proffered that these relatives would testify that

Gore was acting under the domination of his cousin and co-defendant, Fred Waterfield.

The prosecutor objected to the admission of the proffered evidence as being irrelevant, as there was no evidence Gore had been drinking that day, and Fred Waterfield, although present during the abductions, had not initiated the criminal episode and was not present at all during the sexual batteries and murder. The trial court sustained the objection and barred defense counsel from presenting the proffered evidence during the penalty phase. (Trial Transcript 1594-1598). The jury subsequently recommended death by a vote of eleven to one, and on March 16, 1984, the trial court imposed the death sentence for the murder of Lynn Elliott.

On direct appeal to the Florida Supreme Court, Gore did not raise a specific claim pursuant to *Lockett v. Ohio,* 438 U.S. 586 (1978), relative to the exclusion of the proffered alcohol and domination mitigating evidence, although he did argue in Claim XVIII that the exclusion violated Florida law regarding the right to present nonstatutory mitigating evidence. In its opinion on direct appeal affirming Gore's convictions and death sentence, *Gore v. State,* 475 So.2d 1205 (Fla. 1985), *cert. denied,* 475 U.S. 1031 (1986), the Florida Supreme Court did not address this issue.

In his subsequent motion for post-conviction relief, Gore raised a *Lockett* claim based on the exclusion of the alcohol and domination mitigating evidence, as well as a claim that trial counsel was ineffective in his investigation and presentation of the alcohol and domination evidence at the penalty phase. Gore's motion for post-conviction relief was denied by the trial court. In its joint opinion affirming the denial of post-conviction relief and denying Gore's state habeas corpus petition, *Gore v. Dugger, Gore v. State,* 532 So.2d 1048 (Fla. 1988), the Florida Supreme Court did not specifically

address the *Lockett* claim. In discussing Gore's ineffective assistance claim, however, the court recognized that "Gore should have been permitted to introduce such evidence for whatever weight it might be given." *Id.* at 1050.

Gore then filed his petition for writ of habeas corpus in federal district court. Gore raised his *Lockett* claim therein, placing additional reliance on this Court's decision in *Hitchcock v. Dugger,* 481 U.S. 393 (1987). Petitioner conceded that the exclusion of the alcohol and domination mitigating evidence violated *Lockett/Hitchcock,* but argued that the error was harmless because the evidence presented at the guilt phase demonstrated that Gore was not under the influence of alcohol during the crimes, and that Gore orchestrated the kidnappings and committed the sexual batteries on his own, with virtually no assistance from Waterfield.

In its final order, *Gore v. Dugger,* 763 F.Supp. 1110 (M.D. Fla. 1989), the District Court granted the writ as to Gore's death sentence, finding that the *Lockett/Hitchcock* error was not harmless. After reviewing the various opinions of the Eleventh Circuit as to the standards for determining harmless error under *Hitchcock,* the District Court concluded that where relevant mitigating evidence has been excluded, such exclusion can never be harmless regardless of its weight, which the District Court acknowledged "may not be strong." Indeed, in rejecting Gore's claim that trial counsel was ineffective at the guilt phase for not pursuing an intoxication defense, the District Court noted that "there was no direct evidence that Petitioner had been drinking or using drugs on the day of the offense" and that the arresting officers testified he did not appear to be under the influence at the time of his arrest, a short time after the offense. The District Court denied relief as to Gore's convictions.

On appeal to the United States Court of Appeals for the Eleventh Circuit, *Gore v. Dugger,* 933 F.2d 904 (11th Cir. 1991), the Circuit Court adopted the District Court's findings and analysis as to the guilt phase claims, and agreed with the District Court's conclusion that the *Lockett* error was not harmless, though it declined to adopt the District Court's "...conclusions regarding the scope of the harmless error doctrine when applied in *Lockett/Hitchcock* situations." *Id.,* at 905. The Circuit Court explicitly recognized the continuing disagreement amongst the judges of that court "...with respect to the issue of the scope of the harmless error doctrine in such situations." *Id.* Rather than attempt to reconcile the conflict or announce its own formula, the panel below sidestepped the issue, stating "However, in this matter we need not wrestle with such larger questions." *Id.* The Court reasoned that it did not need to address the issue because the panel members all agreed that in this particular case, the error was not harmless.

Petitioner's motion for rehearing and suggestion for rehearing en banc was denied July 23, 1991, and Petitioner's motion to stay mandate was granted August 20, 1991.

REASON FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF ***LOCKETT V. OHIO,*** *438 U.S. 586 (1978) and* ***HITCHCOCK V. DUGGER,*** *481 U.S. 393 (1987), AN ISSUE WHICH THE CIRCUIT COURT BELOW DECLINED TO ADDRESS BASED UPON ITS RECOGNITION THAT CONFLICTING STANDARDS FOR HARMLESS ERROR HAD BEEN APPLIED BY THE CIRCUIT COURT IN ITS PRIOR DECISIONS, AND ANY ATTEMPT TO "WRESTLE" WITH THE ISSUE WOULD ONLY RESULT IN FURTHER CONFLICT.*

It is not unusual for individual judges of an appellate tribunal, and different panels within that tribunal, to hold widely disparate views on a particular issue.[2] What is unusual and indeed virtually unprecedented is for various panels of a United States Court of Appeals to continue to acknowledge that no agreement on a crucial constitutional issue has been reached, while simultaneously refusing any attempt to resolve the conflict via en banc review. Yet that is precisely the situation now existing in the Eleventh

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2 Indeed, such was cited by Alexander Hamilton, in Federalist Paper No. 22, in support of his argument for the necessity of a Supreme Federal judicial body in the plan of the convention:

> There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superin-tendence and authorized to settle and declare in the last resort a uniform rule of civil justice.

Circuit with regards to the standards for determining harmless error in the *Lockett/Hitchcock* context.

The Eleventh Circuit has analyzed the harmfulness of *Lockett/Hitchcock* error in ten other Florida cases,[3] and decided the issue without analysis in four more.[4] The opinion below, the court's most recent effort, barely qualifies for the former category, as the court's harmless error analysis consumes but a single paragraph.[5] The court's few words do however speak volumes concerning the Eleventh Circuit's inability to formulate a coherent, consistent doctrine in this critical area.

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3 *Jackson v. Dugger*, 931 F.2d 712, (11th Cir. 1991), *Aldridge v. Dugger*, 925 F.2d 1320 (11th Cir. 1991), *Booker v. Dugger*, 922 F.2d 633 (11th Cir. 1991), *Demps v. Dugger*, 874 F.2d 1385 (11th Cir. 1989), *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2628 (1990), *Tafero v. Dugger*, 873 F.2d 249 (11th Cir. 1989), *Jones v. Dugger*, 867 F.2d 1277 (11th Cir. 1989), *Knight v. Dugger*, 863 F.2d 705 (11th Cir. 1988), *Clark v. Dugger*, 834 F.2d 1561 (11th Cir. 1987), and *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987).

4 *See, Hargrave v. Dugger*, 832 F.2d 1528 (11th Cir. 1987 *(en banc)*, *cert. denied*, 489 U.S. 1071 (1989), *Messer v. Florida*, 834 F.2d 890 (11th Cir. 1987), *Stone v. Dugger*, 837 F.2d 1477 (11th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989) and *Ruffin v. Dugger*, 848 F.2d 1512 (11th Cir. 1988), *cert. denied*, 488 U.S. 1044 (1989).

5 The panel's analysis of the issue reads thusly in its entirety:

> It seems apparent from the number of various opinions, special concurrences, and dissents written by the judges of our court that some disagreement remains with respect to the issue of the scope of the harmless error doctrine in such situations. However, in this matter, we need not wrestle with such larger questions. This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the *Lockett/Hitchcock* principle cannot be found to be harmless. We therefore AFFIRM the judgment of the district court, but decline to adopt its conclusions regarding the scope of the harmless error doctrine when applied in *Lockett/Hitchcock* situations.

The court below begins by acknowledging the lack of agreement within the Circuit on the scope of *Lockett/Hitchcock* harmless error analysis. It then offers the incredible observation that it need not "wrestle" with the issue of the proper scope of the doctrine, since all three panel members had arrived, by some unknown route, at the unanimous conclusion that the error was not harmless. The court then concludes by expresly not adopting the District Court's conclusions regarding the proper scope of the doctrine, the basis for the disagreement again being left to the reader's imagination.

In this the fifteenth *Lockett/Hitchcock* harmless error issue decided by the Eleventh Circuit, the court has now reached the point where it not only admits it cannot formulate a coherent doctrine, but also declares that the articulation and application of such a doctrine is unnecessary to the determination of harmless error in a given case. It is unnecessary because, apparently, the members of the panel know harmless error when they see it.[6]

That the prior decisions of the Eleventh Circuit are in hopeless conflict is a proposition which cannot be legitimately questioned. In *Tafero v. Dugger,* 873 F.2d 249 at 252, n.5 (11th Cir. 1989), the court first acknowledged that "...we are aware of conflicting viewpoints in this circuit concerning the application of a harmless *Hitchcock* error standard," and did so again in *Delap v. Dugger,* 890 F.2d 285 at 306, n.23 (11th Cir. 1990), *cert. denied,* ___ U.S. ___, 110 S.Ct. 2628 (1990), stating "There is some disagreement in this Circuit as to the

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6 "I'll know it when I see it" reasoning has incurred nearly a half century of judicial condemnation and ridicule, yet it has been employed by the panel below, not because of some regressive judicial philosophy, but rather out of frustration brought on by the complete lack of uniformity in the prior opinions of the Eleventh Circuit.

proper role of the habeas court in weighing aggravating and mitigating evidence in a *Hitchcock* situation."

The polite phrase "some disagreement," also employed by the panel below, does not quite capture the magnitude of the underlying doctrinal conflict within the Eleventh Circuit. The court has disagreed on whether the strength of the aggravating factors should be considered in assessing the harmfulness of the error, a dispute which could hardly be more fundamental to the concept of harmless error. *See Tafero v. Dugger,* 873 F.2d 249 at 252, n.4 (error harmless in large part due to overwhelming strength of aggravating factors), as contrasted with *Knight v. Dugger,* 863 F.2d 705 at 710 (11th Cir. 1988) (number of aggravating factors improper basis for determining harmless error) and *Delap v. Dugger,* 890 F.2d 285 at 306, n. 23 (it is "doubt(ful)" that "a *Hitchcock* error may be deemed harmless because the aggravating factors are strong"). In most cases the court has ignored the strength of the aggravating factors altogether.[7]

The other area of fundamental disagreement is whether the court will examine the weight of the excluded mitigating evidence, or whether it will automatically refuse to find harmless error where any relevant mitigating evidence is excluded. In *Jackson v. Dugger,* 931 F.2d at 716, the court indicated that the excluded mitigating evidence should be examined to determine if it is "significant." If so, the error could not be deemed harmless. *See also Jones v. Dugger,* 867 F.2d at 1279, stating that error would be harmless where excluded evidence is "insignificant." On the other hand, in *Booker v. Dugger,* 922 F.2d 633 at 635, the court reviewed its

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7 *See Jackson v. Dugger,* 931 F.2d 712, 716-18 (11th Cir. 1991), *Booker v. Dugger,* 922 F.2d 633 at 636 (11th Cir. 1991) *Aldridge v. Dugger,* 925 F.2d 1320 at 1328-30 (11th Cir. 1991), *Demps v. Dugger,* 874 F.2d 1385 at 1388-91 (11th Cir. 1990), *Jones v. Dugger,* 867 F.2d 1277 at 1279, 80 (11th Cir. 1989), and *Magill v. Dugger,* 824 F.2d 879 at 893 (11th Cir. 1987).

prior decisions and found that the error could only be harmless where counsel purposely refrained from presenting mitigating evidence or where none was available. In other words, the exclusion of any relevant evidence precluded a finding of harmless error. That is precisely the position espoused by the District Court below, and by the concurring opinion of Judge Clark in *Demps v. Dugger,* 874 F.2d 1385 at 1395, as well as the dissenting opinion of Judge Johnson therein.

In assessing the extent of the disagreement within the Eleventh circuit, it should further be noted that in *Demps, Knight* and *Ruffin v. Dugger,* 848 F.2d 1512 (11th Cir. 1988), there is no true majority opinion, in that each of the three panel members issued a separate opinion on this issue.

In Florida the sentencer, the trial judge, is required to weigh the strength of the aggravating factors against that of the mitigating factors, and to impose death if sufficient aggravating factors exist *and* the mitigating factors are unsufficient to outweigh the factors in aggravation. See § 921.141(2), Fla. Stat. (1977), and *Proffit v. Florida,* 428 U.S. 242 (1976). The panel opinions of the Eleventh Circuit conflict over whether the aggravating side of the sentencing equation should be considered in the harmless error formula. They further conflict over whether the exclusion of relevant mitigating evidence automatically renders the error harmful, or whether the mitigating evidence must possess certain weight before the error is deemed harmful. These conflicts reach the opposite ends of the spectrum for the possible scope of harmless error analysis in the *Lockett/Hitchcock* context, and are truly irreconcilable.

The end result of this fundamental inconsistency is that *Lockett/Hitchcock* error cases are subject to a two stage lottery. The first stage of the lottery occurs in the Federal District Courts, where the court must guess as to the correct

scope of the doctrine.[8] In the instant case the District Court's guess was, according to the panel below, an incorrect one. That the District Court had to wade through a sea of conflicting pronouncements of the Eleventh Circuit in order to hazard its best guess at the correct doctrine,[9] offers vivid testament to the need for a definitive resolution, a resolution which the Eleventh Circuit has steadfastly refused to provide.

The second stage of the lottery is in the Eleventh Circuit itself, which again can select from the full range of views found in its prior opinions. The choice of doctrine, and thus quite possibly the ultimate result, will turn upon the composition of the panel. Such is the current state of affairs in the Eleventh Circuit.

Moreover, the effects of the Eleventh Circuit's fundamental inconsistency on this issue are not limited to Florida. *See Richardson v. Thigpen,* 883 F.2d 895, 897-899 (11th Cir.

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8 Certainly, the Florida courts are left to wonder why the federal appellate bench is unable to articulate a consistent harmless error "standard" to be applied in *Hitchcock / Lockett* issues. The Florida courts routinely apply a workable "harmless error standard" to the cases that they review prior to their entry into the federal judiciary. Cf. Gore v. Dugger, 532 So.2d at 1048.

9 In his arguments in support of the convention's plan for a six year term for members of the senate, Alexander Hamilton, in Federalist Paper No. 62, noted the deleterious effects flowing from inconsistencies in the law, effects which the District Court surely felt with full force below:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?

1989) (*Hitchcock* claim raised by Alabama petitioner), *cert. denied,* ___ U.S. ___, 110 S.Ct. 17 (1989).

The instant case presents a typical Lockett type error, rather than the specific Florida jury instruction issue found in *Hitchcock.* The *Lockett* error herein could just as easily have occurred in any of the other thirty-six states with capital punishment. Had this error occurred outside the Eleventh Circuit, that particular state's supreme court, the federal district and federal circuit courts would all logically look for guidance to the Eleventh Circuit, which due to its wealth of *Hitchcock* experience presumably would have honed *Lockett* harmless error doctrine to a fine edge. In so doing these courts would find support for the most liberal rule[10] as well as the most conservative,[11] and everything in between. The Eleventh Circuit is certainly the court for all seasons in this regard, and its disparate decisions might well prove the source of intercircuit conflict in the years to come, in addition to the intracircuit conflict which petitioner now asks this Court to resolve.

This Court certainly has jurisdiction to grant the writ to resolve the conflict within the Eleventh Circuit. *See John Hancock Insurance Company v. Bartels,* 308 U.S. 180, 181 (1939) (certiorari granted due to intracircuit conflict and importance of question presented).

Petitioner does not seek certiorari review because the Eleventh Circuit reached the wrong result in this particular case, though obviously Petitioner is confident that the facts

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10 *See Booker* (harmless error limited to situations where no valid mitigating evidence was excluded), and concurring opinion of Judge Clark in *Demps* (same).

11 *See Tafero* (harmless error can be based on overwhelming strength of aggravating factors and relative weakness of excluded mitigating evidence).

support its contention. Nor does Petitioner seek review because of any errors in the panel's legal analysis, as the panel undertook no legal analysis. Rather, Petitioner seeks this Court's review because of the underlying reason for the panel's lack of analysis, i.e., the Eleventh Circuit's diametrically opposing precedents in this area.

This Court should grant review because the issue is fundamental. In assessing whether a *Lockett* sentencing phase error (and indeed any type of sentencing phase error) is harmless, does the reviewing court examine the entire sentencing equation,[12] including the strength of the evidence the sentencer considered in aggravation and mitigation, and the projected effect of the constitutional error, which in the *Lockett* context consists of the projected impact of the excluded mitigating evidence? Or does the court ignore completely the aggravating side of the equation, which consists of factors derived from the facts of the offense and the defendant's criminal record? *Note: Payne v. Tennessee,* 501 U.S. ____, 115 L.Ed.2d 720, 111 S.Ct. ____ (1991). Secondly, if the weight of the aggravating factors is irrelevant, is the weight of the excluded mitigating evidence to be considered, or does the exclusion of any relevant mitigating evidence automatically preclude a finding of harmless error? *Note: Walton v. Arizona,* 497 U.S. ____, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990).

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12 Guilt phase errors are examined in this manner, with the strength of the evidence of guilt weighed against any exculpatory evidence, with the projected effect of the constitutional violation being the final factor. In other words, the totality of the circumstances. *See Chapman v. California,* 386 U.S. 18 (1967).

Although this Court addressed the Lockett harmless error issue in *Skipper v. South Carolina*, 476 U.S. 1 (1986),[13] this Court did not announce a comprehensive Lockett harmless error formula.

In *Satterwhite v. Texas*, 486 U.S. 249 (1988), this Court considered whether a Sixth Amendment violation at the sentencing phase was harmless, but again this Court's analysis did not set forth a broad formula comparable to that announced in *Chapman v. California*, 386 U.S. 18 (1967), for guilt phase errors. This Court did however acknowledge in *Satterwhite* that the dictates of *Chapman* do apply to sentencing phase errors,[14] which indicates this Court's

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13 This Court did not conduct a specific harmless error analysis in *Lockett* or *Eddings v. Oklahoma*, 455 U.S. 104 (1982). In *Lockett* the excluded mitigating evidence included the fact that Lockett was only an aider and abettor, had no knowledge a murder would occur, had no significant criminal history, was of low intelligence, and only 21 years old at the time of the offense. In *Eddings*, the excluded evidence consisted of compelling evidence of the sixteen year old defendant's troubled and physically abusive upbringing, and a severe emotional disturbance prior to and during the murder. Given the undisputed strength of the excluded mitigating evidence and the lack of an overwhelming case in aggravation, harmless error was not an issue in either case. In *Hitchcock* this Court did not conduct a harmless error analysis because the State never asserted that the error was harmless. 481 U.S. at 399.

14 This Court stated in *Satterwhite:*

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury. Accordingly, we hold that the *Chapman* harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith.*

Satterwhite v. Texas, 486 U.S. at 258.

acceptance of a totality of the circumstances harmless error test.

Petitioner offers no argument herein as to the propriety of one formula over another, as whether this Court would ultimately agree with Petitioner's position is irrelevant to the necessity for review by this Court. Review should be granted because the Eleventh Circuit's precedents are in hopeless conflict concerning the scope of a crucial constitutional doctrine.

CONCLUSION

WHEREFORE, for the aforementioned reasons, Petitioner respectfully prays that the petition for writ of certiorari will be granted.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-4026

DAVID ALAN GORE,

Petitioner-Appellant,
Cross-Appellee,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

( ) The motion of *appellee/cross-appellant, Harry K. Singletary,* for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of *appellee/cross-appellant, Harry K. Singletary,* for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *October 21, 1991,* the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme that the certiorari

petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

_____/s/_____
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-4026

DAVID ALAN GORE,

Petitioner-Appellant,
Cross-Appellee,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTIONS OF REHEARING EN BANC

(Opinion May 29, 1991 , 11th Cir., 1991, ___ F.2d___).

Before: TJOFLAT, Chief Judge, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it,

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-4026

D.C. Docket No. 89-203 CIV-T-10(C)

DAVID ALAN GORE,

Petitioner-Appellant,
Cross-Appellee,

versus

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Florida

(May 29, 1991)

Before TJOFLAT, Chief Circuit Judge, and FAY and JOHNSON, Circuit Judges.

PER CURIAM:

The district court granted partial relief in this petition filed pursuant to 28 U.S.C. § 2254. The state appeals the granting of relief. The petitioner cross-appeals the denial of relief as to those claims found to be without merit. We affirm.

Petitioner was convicted of first degree murder, two counts of kidnapping, and three counts of sexual battery.

He was sentenced to death for the first degree murder count. Sentences of life imprisonment were imposed on the kidnapping and sexual battery counts. These convictions and sentences were affirmed on appeal, and petitioner's post-conviction remedies under state law have been exhausted.

On consideration of Gore's *habeas corpus* petition, the district court conducted a detailed analysis of each of the seventeen claims presented and entered a comprehensive and scholarly Memorandum Opinion published at ___ F. Supp. ___ (M.D. Fla. 1991). We agree with the findings and conclusions of the district court as set forth in its opinion.

We clarify our ruling, however, in one regard. Gore claimed that his rights under the sixth, eighth, and fourteenth amendments were violated when the state trial court precluded him from presenting certain mitigating evidence to the sentencing jury in violation of *Hitchcock v. Dugger,* 481 U.S. 393 (1987) and *Lockett v. Ohio,* 438 U.S. 586 (1978) (plurality opinion).[1] The district court agreed. However, it then went on to recognize that under the law of our circuit such a violation is subject to the harmless error doctrine. *See Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir. 1989). The district court discussed and analyzed all of the recent opinions of our court, and drew certain conclusions about the scope of this harmless error doctrine when applied in *Lockett/Hitchcock* situations.

It seems apparent from the number of various opinions, special concurrences, and dissents written by the judges of

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1 Under *Hitchcock* and *Lockett,* the eighth amendment requires that a capital sentencing jury "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." *Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir. 1989) (emphasis in original) (citations omitted).

our court that some disagreement remains with respect to the issue of the scope of the harmless error doctrine in such situations. However, in this matter, we need not wrestle with such larger questions. This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the *Lockett/Hitchcock* principle cannot be found to be harmless. We therefore AFFIRM the judgment of the district court, but decline to adopt its conclusions regarding the scope of the harmless error doctrine when applied in *Lockett/Hitchcock* situations.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 89-203 CIV-T-10(C)

DAVID ALAN GORE,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

_____/

MEMORANDUM OPINION

This is a petition for a writ of habeas corpus pursuant to 28 USC § 2254 brought by a state prisoner under sentence of death. The petition was filed on February 14, 1989, together with an application for stay of the Petitioner's execution then set for February 16, 1989. In order that the Petitioner's claims could be judiciously considered, I entered a stay of execution on February 14, 1989.

The complete record has now been compiled. The issues have been briefed and the Petitioner's claims have been fully considered. Upon due consideration, I have concluded that Petitioner's claim based on *Hitchcock v. Dugger,* 107 S.Ct. 1821 (1987) and *Lockett v. Ohio,* 98 S.Ct. 2954 (1978) is meritorious and that the petition must be granted in order to afford the Petitioner a new sentencing hearing. With respect to all other claims, the petition is without merit and is denied.

FACTS SURROUNDING THE OFFENSE

The Supreme Court of Florida, in disposing of the Petitioner's direct appeal, *Gore v. State,* 475 So.2d 1205, 1206 (Fla. 1985), recited the facts of the case as follows:

> Gore and his cousin picked up fourteen-year-old Regan Martin and seventeen-year-old Lynn Elliott who were hitchhiking to the beach. After the glove compartment in the pickup truck fell open and a gun became visible, Gore took the gun and held it to Regan's head. He grabbed the two girls' wrists and held them together. Gore then said that they should take the girls to Gore's home. He told the girls that if they said or did anything, they would be killed. When they arrived at his home, the girls were handcuffed and taken into a bedroom. The girls then were separated, and Lynn was tied up while Regan was handcuffed. Gore cut Regan's clothes off of her and sexually assaulted her on three separate occasions. Regan testified that she heard noises in the other room after Gore had left her. She heard Gore tell Lynn to shut up or he would kill her. Gore also told Regan to be quiet or he would slit her throat and that he would do it anyway. Gore then put Regan in the closet, and, after he left, she heard two or three shots. Gore then came back into the room and put Regan in the attic where she stayed until rescued by a police officer.
>
> Michael Rock, a fifteen-year-old boy, testified that on July 26, 1983, while riding his bicycle in the area of Gore's home, he heard screaming and observed a naked girl running down the driveway being chased by Gore who was also naked. He saw Gore catch up to her, drag her back to a palm tree,

and shoot her twice in the head. Rock went home and told his mother, and she called the police. The police arrived and surrounded Gore's home. Lynn's body was found in the trunk of the car in the driveway. Her arms and legs had been tightly bound with rope. She had multiple abrasions on her body consistent with falling and being dragged. The gun used to kill her was found in Gore's home.

HISTORY OF THE CASE

The Petitioner was indicted, tried and found guilty of first degree murder, two counts of kidnapping and three counts of sexual battery. Following a sentencing hearing, the Petitioner was sentenced to death for first degree murder. (R. 845-47).[1] The trial court also sentenced Petitioner to life imprisonment on each of the two counts of kidnapping, to be served concurrently, and on each of the three counts of sexual battery, to be served concurrently with each other but consecutively to the sentences imposed on the kidnapping charges. (R.848-54).

On August 22, 1985, the Florida Supreme Court affirmed the convictions and sentences. *Gore v. State,* 475 So.2d 1205 (Fla. 1985). The United States Supreme Court denied certiorari on February 24, 1986. *Gore v. Florida,* 106 S.Ct. 1240 (1986).

On February 24, 1988, the Petitioner filed a motion for post conviction relief pursuant to Rule 3.850, Fla. R. Crim.

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1 The record of the proceedings in the Petitioner's trial and direct appeal will be referred to by the symbol "R" followed by the appropriate page number. The record of the proceedings in the state court post conviction evidentiary hearing will be referred to by the symbol "EH" followed by the appropriate page number.

P., in the state trial court. Shortly thereafter, the Governor of Florida signed Petitioner's first death warrant. Execution was scheduled for May 4, 1988.

On April 4, 1988, Petitioner filed a petition for a writ of habeas corpus in the Florida Supreme Court.

The state trial court conducted an evidentiary hearing on Petitioner's Rule 3.850 motion on April 15, 18 and 19, 1988. At the conclusion of the hearing, the court entered on order denying Petitioner's motion. (EH 1121-26).

The Florida Supreme Court consolidated Petitioner's appeal from the trial court's denial of his Rule 3.850 motion with his petition for a writ of habeas corpus and, following oral argument, granted Petitioner a stay of execution. On August 18, 1988, the Court affirmed the trial court's denial of Petitioner's Rule 3.850 motion and also denied his petition for a writ of habeas corpus. *Gore v. State/Gore v. Dugger,* 532 F.2d 1048 (Fla. 1988).

The Governor of Florida signed Petitioner's second death warrant on January 31, 1989. The Petitioner filed the present petition in this Court on February 14, 1989, together with an application for stay of the execution then scheduled for February 16. A stay was entered due to the short time remaining before the scheduled execution and the necessity that the Court review the voluminous record.

The State does not dispute that Petitioner has exhausted his state remedies as required by 28 USC § 2254; and, as previously noted, the state trial court has conducted an evidentiary hearing. The court considered and determined at that time the Petitioner's claims, including his claim of ineffective assistance of counsel. While factual findings of the state court are entitled to a presumption of correctness under 28 USC § 2254(d) and *Sumner v. Mata,* 101 S.Ct. 764 (1981), claims of ineffective assistance of counsel present

mixed questions of law and fact, and as such, the state court's determination of ineffective assistance claims are not entitled to that presumption. *Douglas v. Wainwright,* 714 F.2d 1532, *vacated* 104 S.Ct. 3575, *aff'd on remand* 739 F.2d 531 (11th Cir. 1984). Nevertheless, review of the transcript of the post conviction proceedings in the state court demonstrates that the Petitioner was afforded a full and fair hearing within the meaning of 28 USC 2254(d)(6), and that transcript, taken together with the trial record, excludes the necessity of an evidentiary hearing on any of the claims now before this Court.[2]

The Petitioner has presented seventeen claims of alleged constitutional deprivation. Each will be considered in turn.

I

In his first claim Petitioner asserts that his rights under the Sixth, Eighth and Fourteenth Amendments were violated when the state trial court precluded him from presenting certain mitigating evidence to the sentencing jury in violation of the Supreme Court's decisions in *Hitchcock v. Dugger,* 107 S.Ct. 1821 (1987) and *Lockett v. Ohio,* 98 S.Ct. 2954 (1978).

In *Hitchcock* and *Lockett* the Court made it clear that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, requires that a capital sentencing jury not "be precluded from considering, as a mitigating

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2 *See* Rule 8, Rules — Section 2254 Cases (adopted pursuant to 28 USC § 2254). Petitioner contends that the state court did not give him a complete hearing because it did not receive evidence on his claim concerning the ineffectiveness of his mental health expert. As is more fully discussed *infra,* given the Court's resolution of this issue, no hearing is needed on this claim.

factor, *any* aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." *Jones v. Dugger,* slip op. at 1718 (11th Cir. February 28, 1989). (emphasis in original) (citations omitted). In this case Petitioner contends that the trial court committed *Hitchcock/Lockett* error when it excluded mitigating evidence on two subjects: Petitioner's drug and alcohol abuse, and the dominance exercised over him by his cousin, Frederick Waterfield. With respect to his use of drugs and alcohol, Petitioner attempted to introduce evidence at his sentencing hearing to show that he had been drinking and taking pills around the time of the commission of the offenses. Defense counsel stated to the court that he planned to have members of Petitioner's family testify both that he had been acting strangely during the days prior to the murder and that, because of the way he was acting when they saw him shortly after his arrest, they believed that he had been drinking. Petitioner also sought to introduce evidence that, after the crime, a half empty bottle of vodka and some pills were found in his bedroom. The trial judge refused to admit any of this evidence ruling that it was irrelevant because there was no direct evidence that Petitioner was drinking while the offenses were being committed and because there was testimony from the surviving victim and law enforcement personnel to the effect that Petitioner did not appear drunk. (R. 3047-56).

In evaluating Petitioner's *Lockett/Hitchcock* claim, this Court is, of course, bound by the Eleventh Circuit's interpretation of those decisions. One of the Circuit's most recent decisions on the point is *Demps v. Dugger,* slip op. at 1996 (11th Cir. March 28, 1989). Because the *Demps* case produced an opinion by each of the members of the panel, however, it is necessary to review those opinions in some detail to determine the current state of *Lockett/Hitchcock* law in the circuit.

In *Demps* the petitioner was convicted of first degree murder and was sentenced to death for the killing of a fellow prison inmate. Demps challenged his sentence on *Hitchcock* grounds by arguing that the trial court's instruction to the jury impermissibly precluded them from considering non-statutory mitigating evidence. The Court of Appeals agreed, concluding that "the judge gave an instruction functionally identical to that [erroneously] given in *Hitchcock.*" *Demps,* slip op. at 2000. The three judges on the panel did not agree, however, on how to properly analyze and evaluate the *Hitchcock* claim.

In the lead opinion for the court, Judge Fay began his analysis by stating that *Hitchcock* error can be harmless under "the strict *Chapman* criterion." *Id.* at 2001 citing *Chapman v. California,* 87 S.Ct. 824 (1967). And, for a *Hitchcock* error to be harmless, a court must, after an in depth review of the entire record, "determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence." *Id.* Judge Fay then examined each of the four types of evidence which Demps alleged would have influenced the jury to recommend life and concluded that since none of the evidence excluded from the jury's consideration would have affected

its sentencing recommendation, the *Hitchcock* error was harmless and resentencing not required. *Id.* at 2001-2.[3]

Judge Clark, in his special concurrence, agreed with Judge Fay that Demp's petition should be denied but disagreed with his handling of the *Hitchcock* claim because the analysis was based on the harmlessness of the *Hitchcock* error. *Id.* at 2005 (Clark, J., specially concurring). Judge Clark concluded that "[t]his case is not a potential *Hitchcock* error case. Although there was an erroneous *Hitchcock* instruction, there has been no showing that any credible non-statutory mitigating evidence exists." *Id.* at 2006 (Clark, J., specially concurring). Since Judge Clark concluded that the "evidence" Demps wished to present to the

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3 The four types of evidence offered by Demps and analyzed by Judge Fay were as follows:

(1) Evidence of "honorable military combat service." Judge Fay concluded that exclusion of this evidence from the jury's consideration was harmless because Demp's service record was not "honorable" at all. He was given one special court-martial, numerous other punishments, and a dishonorable discharge which was eventually upgraded to a general discharge. Judge Fay thus concluded that Demps's military record did not reflect favorably on his character and would not have influenced the jury to recommend life.

(2) Evidence of a history of drug abuse. Judge Fay concluded that exclusion of this evidence from the jury's consideration was also harmless because Demps's drug addiction predated his incarceration on unrelated charges and that no evidence existed to show that drugs or treatment for drug dependence influenced his participation in the prison murder.

(3) Evidence of a good prison record. Judge Fay concluded that exclusion of this evidence from the jury's consideration was harmless because Demps's prison record was not good and, in fact, indicated that he had a record of continuing disciplinary problems.

(4) Evidence that his two co-perpetrators received life sentences. Judge Fay concluded that exclusion of this evidence from the jury's consideration was harmless because Demps's prior criminal record was more severe than his co-perpetrators and that it was sufficient to justify imposing a more serious penalty. *Id.* at 2001-02.

jury did not reach the threshold of being *Hitchcock* mitigating evidence (because there were no facts to substantiate his claims), he did not believe that a *Chapman* harmless error analysis was necessary or appropriate. *Id.* at 2007 (Clark, J., specially concurring). Indeed, Judge Clark found the case to be comparable to *Clark v. Dugger,* 834 F.2d 1561 (11th Cir. 1987), *cert. denied,* 108 S.Ct. 1282 (1988), in which the court found:

> Here, however there simply were no nonstatutory mitigating circumstances to consider. Clark did not introduce any evidence that would support the existence of a nonstatutory mitigating circumstance. As explained, *supra,* Clark's counsel, after her investigation, made a tactical decision that any testimony at the penalty phase could only prove harmful. Thus, Clark failed to introduce any mitigating evidence whatever.

Clark, 834 F.2d at 1569 *quoted in Demps,* slip. op. at 2007 (Clark, J., specially concurring).

Although Judge Clark recognized that the *Clark* court had held that any *Hitchcock* error in that case was harmless under *Chapman,* he stressed that "harmless" was an incorrect label because "[w]here there is no nonstatutory mitigating evidence there can be no *Hitchcock* error and harmlessness need not be considered." *Id.* Further, he rejected the application of a harmless error standard in a case in which legitimate *Hitchcock* evidence might be offered stating that "[i]f such evidence exists, the case should be returned to the state court for resentencing..." *Id.* at 2006 (Clark, J., specially concurring) (citations omitted). Judge Clark explained that

> I deem it an inappropriate function for a federal court to weigh nonstatutory mitigating evidence against aggravating circumstances and decide

> whether a petitioner should get the death penalty as an alternative to a resentencing hearing. That is an invasion of the separate states' rights and obligations for their courts to insure appropriate sentencing in death penalty cases.... If there is credible evidence demonstrated by the petitioner, we should return the case to the state court for resentencing.

Id. at 2008 (Clark, J., specially concurring).

Dissenting on the *Hitchcock* issue was Judge Johnson. Initially, citing *Clark v. Dugger,* Judge Johnson agreed with Judge Fay that *Hitchcock* error may be harmless in some circumstances, but he immediately qualified his statement by noting that "this Court has only once found *Hitchcock* error to be harmless, *see Clark, supra,* and the Supreme Court has never found the error to be harmless in its four reversals of death sentences for failure of the sentencer to consider non-statutory mitigating circumstances."[4] *Id.* at 2008 (citations omitted) (Johnson, J., concurring in part, dissenting in part). Judge Johnson further noted that "[t]he *Knight* decision[5] leaves little room for the application of

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4 Subsequently, as discussed *infra,* in a recently released opinion, *Tafero v. Dugger,* slip op. at 2416 (11th Cir. May 1, 1989) (per curiam), the Circuit once again found a *Hitchcock* error to be harmless.

5 In *Knight v. Dugger,* 863 F.2d 705 (11th Cir. 1988), the Court of Appeals rejected the State's contention that the failure of the jury to consider all mitigating factors was harmless error because of the large number of aggravating factors that had been found. The *Knight* court stated:

> No authority has been furnished for this proposition and it seems doubtful that any exists. The State's theory, in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of course, that is at the heart of *Lockett* and its progeny.

harmless error analysis, except in the situation where [no] non-statutory mitigating evidence could have been proffered." *Id.; see also Knight v. Dugger,* 863 F.2d 705 (11th Cir. 1988). Thus, Judge Johnson agreed with Judge Clark that applying a harmless error analysis to a *Hitchcock* error is inappropriate, except for the situation in which no mitigating evidence is offered (a circumstance which, as discussed *supra,* Judge Clark considers to be outside the realm of *Hitchcock* altogether).

Judge Johnson's disagreement with Judge Clark, and his dissent from the result reached by the court, stemmed from the fact that he believed the case should be remanded to the district court for inquiry into whether Demps had any legitimate mitigating evidence to present instead of having the Court of Appeals make that initial factual determination. Judge Johnson believed that if any of Demps's claims were true, then excluding them from the jury's consideration was constitutional error. *Id.* at 2009 (Johnson, J., concurring in part, dissenting in part). Thus, Judge Johnson concluded that "[t]he determination of whether the error committed in Demps' case was harmless or not depends entirely on the truth of his claim that unconsidered mitigating factors existed." *Id.*

A synthesis of the three opinions in *Demps* leads the Court to conclude that the following propositions were adopted by a majority of the panel and thus constitute binding precedent which this Court must apply. First, a district court must determine when reviewing a *Hitchcock* claim, whether the mitigating evidence sought to be placed before the jury is, in fact, mitigating evidence. In making this determination the district court may review not only the evidence presented on the issue by the petitioner but may also consider any evidence advanced by the State which contests the truthfulness or relevancy of the petitioner's evidence. If the court concludes that the evidence offered by the petitioner

is either patently untrue or irrelevant, *i.e.,* that it is not mitigating, then it was not error (or, at worst, was harmless error) for the trial court to have precluded the jury from considering it. Second, however, if the excluded evidence does have some mitigating value, then the court should not attempt to balance the weight of all the evidence presented at the sentencing hearing by conducting a harmless error review, but instead should vacate the death sentence and return the case to the state court for resentencing.

The Court of Appeals' recent decision in *Tafero v. Dugger,* slip op. at 2416 (11th Cir. May 1, 1989) (per curiam), does not alter this conclusion. In *Tafero* a different panel of the Court (consisting of Judges Vance, Kravitch and Hatchett) stated that *Hitchcock* error could be harmless and held that it was so in that case. *Id.* at 2419. The court noted, however, that the case

> parallels the situation in *Clark v. Dugger.* Tafero's counsel, like the *Clark* defendant's counsel, purposely presented no non-statutory mitigating evidence.... The *Clark* court held that any *Hitchcock* error was harmless because of the defendant's counsel's failure to present non-statutory mitigating evidence. Likewise, we conclude that any *Hitchcock* error by Tafero's counsel was harmless.

Id. at 2419 n.5.

Tafero, therefore, when examined in light of its facts, does not affect the Court's understanding of the law of the Circuit on the *Hitchcock* issue as established by *Demps;* and, applying that law to the facts of this case leads the Court to conclude that constitutional error was committed during Petitioner's sentencing hearing. The truthfulness of the alcohol and drug evidence sought to be introduced, the presence of the half empty bottle of vodka, the pills and the

Petitioner's relative's statements that he behaved as though he were under the influence, has not been questioned.[6] Nor can the evidence be considered irrelevant. The evidence could support an inference that the Petitioner had been drinking and/or taking pills at or about the time the murder was committed. This certainly can be considered as mitigating by the sentencing jury.[7] *See e.g., Hargrave v. Dugger,* 832 F.2d 1528 (11th Cir. 1987); *Fead v. State,* 512 So.2d 176 (fla. 1987). Thus, although in the totality of the circumstances the Petitioner's mitigating evidence may not be strong, it is for the state jury and judge to decide what sentence is appropriate when *all* mitigating factors are considered. Since the jury did not have the opportunity to consider all

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6 Certainly, though the State has sought to disprove the truthfulness of the *inference* Petitioner hopes the jury draws from the evidence, that he was intoxicated at the time of the murder. However, this attack on the truthfulness of the ultimate conclusion is qualitatively different from an attack on the truthfulness or reliability of the actual evidence itself. Unlike the situation in *Demps* in which the State sought to disprove the evidence of the existence of an honorable discharge, the State does not argue here that the pills or vodka bottle were not found in Petitioner's room. Further, an attack on the inference a petitioner hopes a jury draws from truthful evidence cannot be adequate to sustain the exclusion of the evidence itself. Otherwise, a trial court could preclude a defendant's mother from testifying that her child was always a good boy when his record is to the contrary. Clearly this type of character evidence cannot be barred under *Lockett/Hitchcock.* Instead, it is the province of the jury to weigh its credibility.

7 The jury, of course, may also consider the State's evidence which it contends shows that the Petitioner was not intoxicated at the time of the offense.

mitigating evidence, the Petitioner's sentence of death was imposed in violation of the Eighth Amendment and relief must be granted on this claim.[8]

II

In his second claim Petitioner contends that he was deprived of his due process and equal protection rights under the Fourteenth Amendment, as well as his rights under the Fifth, Sixth and Eighth Amendments, because his court-appointed mental health expert failed to conduct a competent and professionally appropriate evaluation of him thereby overlooking numerous mitigating factors which could have been presented to the sentencing jury. More specifically, Petitioner asserts that Dr. David Tingle, the psychiatrist appointed by the Court at the Petitioner's request,[9] rendered professionally inadequate services in that he failed:

> to follow or even understand the simple requests of counsel regarding the scope of the evaluation, to conduct proper testing, and to review the amply available and extensive background materials and

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8 As previously indicated, Petitioner has raised one other *Lockett/Hitchcock* claim arguing that the trial court improperly excluded from the jury's consideration evidence concerning Waterfield's domination over him. Given the Court's determination that a resentencing is mandated because of the exclusion of the drug and alcohol evidence, the Court need not consider this claim. The Court notes that in its opinion on Petitioner's Rule 3.850 motion, the Florida Supreme Court has already stated that this domination evidence should have been admitted at the sentencing phase. *Gore v. Dugger,* 532 So.2d 1048, 1050 (Fla. 1988). Thus, on resentencing the Petitioner will also be able to introduce this evidence.

9 The Court notes that in Petitioner's motion for apointment of psychiatrists and psychologists, he specifically requested "an order authorizing the defendant to retain the services of Dr. David Tingle, M.D., a competent and qualified psychiatrist." (R.32). The trial court granted Petitioner's motion and appointed Dr. Tingle. (R.413).

> collateral data which would have demonstrated [Petitioner's] life-long mental disabilities, his history of severe alcohol and substance abuse, the effects of intoxicants on his character, personality, behavior, and control, and a veritable plethora of information which would have, if properly assessed, evaluated, and related in a professionally competent manner, established myriad statutory and non-statutory mitigating circumstances.

(Petition for writ of habeas corpus, p. 75). Petitioner alleges that because Dr. Tingle's inadequate assistance with respect to investigating and evaluating potential mitigating evidence to be presented at the penalty phase, his sentence of death was imposed in an unfair and unreliable manner. Petitioner requests that this Court conduct an evidentiary hearing since the state court refused to hold a hearing on this claim.

In sum, Petitioner's claim is that his court-appointed psychiatrist rendered him ineffective assistance; and he relies on the Supreme Court's decision in *Ake v. Oklahoma,* 105 S.Ct. 1087 (1985), to support his contention that the Due Process Clause requires that a criminal defendant be given competent psychiatric assistance to aid him in preparing his defense, including the presentation of mitigating circumstances. *Ake* and its progeny, however, while establishing a limited right to court-appointed psychiatric assistance in presenting a defense, do not stand for the expansive proposition Petitioner asserts.

In *Ake,* the Supreme Court considered an indigent capital defendant's need for psychiatric assistance both at trial and at the penalty phase. With respect to the guilt phase, the Court held that as a matter of due process

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a

> significant factor at trial, the State must, at a minimum assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense.

Ake, 105 S.Ct. at 1097. The Court's discussion of the need for psychiatric assistance during the penalty phase was considerably more narrow. The Court focused on the fact that in some states the jury is allowed to consider psychiatric evidence of the defendant's future dangerousness in fixing or recommending sentence. The Court held

> In such a circumstance, where the consequence of error is so great, the relevance of *responsive* psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing hearing.

Id. (emphasis added). *See also Thompson v. Wainwright,* 787 F.2d 1447, 1459 (11th Cir. 1986), *cert. denied,* 107 S.Ct. 1986 (1987).

In this case, Petitioner does not claim that he was denied the assistance of a psychiatrist in determining whether to present an insanity defense; hence, *Ake's* first principle is inapplicable. The Court concludes that *Ake's* second principle is similarly inapplicable because "[u]nlike the sentencing situation in *Ake,* [Petitioner's] prosecutor had no need to present psychiatric evidence to show an aggravating factor, and he presented none. The dangers and inequities which concerned the Court in Ake consequently did not exist." *Bowden v. Kemp,* 767 F.2d 761, 764 n.5 (11th Cir. 1985). *Ake* simply stands for the proposition that a defendant must be afforded psychiatric assistance at the penalty phase to rebut the State's own psychiatric evidence. Where

no such evidence is presented, *Ake* confers no constitutional right to state afforded psychiatric assistance at the penalty phase. Since, as previously noted, the State presented no psychiatric testimony during the penalty phase of Petitioner's trial, he cannot claim to have a federal right to the assistance of a psychiatrist at that phase of trial.

Petitioner also argues that the denial of the effective assistance of a psychiatrist at the penalty phase violated his rights under Florida law. Two recent decisions of the Florida Supreme Court appear to give criminal defendants a slightly expanded right under state law to the assistance of a psychiatrist at the penalty phase when there are "clear indications of either mental retardation or organic brain damage." *State v. Sireci,* 502 So.2d 1221, 1224 (Fla. 1987) *citing Mason v. State,* 489 So.2d 734 (Fla. 1986). In this case, however, the trial court specifically found that the Petitioner's right to a psychiatrist under state law was not violated and the Florida Supreme Court agreed. This Court's review of that decision is limited to the question of whether the state courts' finding on an issue of state law is "so unprincipled or arbitrary as to somehow violate the United States Constituion." *Barclay v. Florida,* 103 S.Ct. 3418, 3423 (1983). Upon review of the record, the Court cannot say that the state courts' decision was arbitrary or irrational. Petitioner, therefore, has failed to demonstrate that he is entitled to relief.

Accordingly, this claim is DENIED.

III

Petitioner asserts that he was convicted on the basis of statements obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. More specifically, Petitioner contends that the trial court impermissibly allowed certain statements he gave to law enforcement personnel to be

admitted into evidence in violation of *Miranda v. Arizona,* 86 S.Ct. 1602 (1966) and *Edwards v. Arizona,* 101 S.Ct. 1880 (1981). Petitioner argues that the statements he gave to Detectives Bevis and Dubose at the Sheriff's Office, which were later admitted into evidence at his trial, were obtained only after he had previously requested the presence of counsel.

Upon review of the record, the Court cannot agree with Petitioner that there was a *Miranda/Edwards* violation in this case. The testimony presented to the trial court during its hearing on Petitioner's motion to suppress discloses that immediately upon arrest at his parents' home Petitioner was read the *Miranda* warnings. (R.1222, Testimony of Lt. Curt Keuhn). In response, Petitioner indicated that he "had a lot of things to get off his chest" and then he wanted to speak with a lawyer. (R.1222, Testimony of Lt. C Keuhn; R. 1244 Testimony of Ofc. C.C. Walker; R.1307, Testimony of Det. Neil Bevis). Upon his arrival at the Sheriff's Office, Petitioner was reminded of his *Miranda* rights and he once again indicated a willingness to make certain statements without a lawyer being present. (R. 1311-12, Testimony of Det. N. Bevis). It was these statements which were admitted into evidence and about which Petitioner now complains.

Petitioner's argument that he explicitly or equivocally invoked his right to counsel is without merit. Petitioner clearly and unambiguously stated that he understood his rights[10] and that he wished to make certain statements to police before speaking with an attorney. Petitioner's statements both immediately after his arrest and again at the Sheriff's Office demonstrate an intent to waive his *Miranda* rights at least to the extent of making certain initial statements. Petitioner's mere mentioning of his desire to consult

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10 The Court notes that Petitioner was an auxiliary police officer who was trianed in arrest procedures and *Miranda* rights.

with an attorney at some time in the future (as opposed to a present request for an attorney) was not an equivocal request for counsel sufficient to require that the police terminate questioning until clarified. *See Bruni v. Lewis,* 847 F.2d 561, 564 (9th Cir.), *cert. denied,* 109 S.Ct. 403 (1988); *see also United States v. Jardina,* 747 F.2d 945, 949 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 1773 (1985) (the word attorney has no talismanic qualities; a defendant does not invoke his right to counsel merely be mentioning the word). Therefore, it was not erroneous for the trial court to deny Petitioner's motion to suppress and to permit his statements to be admitted into evidence.

Accordingly, this claim is DENIED.

IV

A jury can find an aggravating circumstance under Florida Statute § 921.141(5)(h) if they find that "[T]he capital felony was especially heinous, atrocious, or cruel." The Petitioner contends that the Florida Supreme Court has interpreted this statutory aggravating circumstance in an unconstitutionally overbroad manner in violation of *Maynard v. Cartwright,* 108 S.Ct. 1853 (1988), and the Eighth and Fourteenth Amendments. The Petitioner further contends that the trial court's instructions to the jury failed to guide the jury's sentencing discretion and provided "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia,* 100 S.Ct. 1759, 1767 (1980). These arguments are without merit.

The Florida Supreme Court has held that the "especially heinous, atrocious or cruel" statutory language is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon,* 282 So.2d 1, 9 (Fla. 1973). *See also Halliwell v. State,* 323 So.2d

557, 561 (Fla. 1975); *Tedder v. State,* 322 So.2d 908, 910 (Fla. 1975); *Alford v. State,* 307 So.2d 433, 445 (Fla. 1975). In light of the construction placed under § 921.141(5)(h) in these cases, the provision is not constitutionally overbroad. *Proffitt v. Florida,* 96 S.Ct. 2960, 2968 (1976).

In instructing the jury with respect to this statutory aggravating circumstance, the trial judge stated, in pertinent part:

> Now, the aggravating circumstances that you may consider are limited to any of the following that are established by the evidence...
>
> Now, the crime — the fourth, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. Now, this aggravating circumstance is only applicable if the State of Florida has proven beyond a reasonable doubt that the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies.
>
> The murder must have been a consciousless (sic) or pitiless crime which was unnecessarily torturous to the victim. (Tr. 3232-33).

This clarifying instruction substantially complies with the limiting construction placed upon § 921.141(5)(h) by the Florida Supreme Court as approved in *Proffitt.* Moreover, the Court agrees with the Florida Supreme Court that this aggravating circumstance was established beyond a reasonable doubt. *Gore v. State,* 475 So.2d 1205, 1210-11 (Fla. 1985). Section 921.141(5)(h) is not unconstitutional as applied in this case.

Accordingly, this claim is DENIED.

V

The Petitioner also contends that the aggravating circumstance set forth in Fla. Stat. § 921.141(5)(i) is unconstitutional on its face and as applied in this case. Section 921.141(5)(i) allows the sentencing court to find an aggravating circumstance where "the...homicide...was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The Petitioner argues that this aggravating factor does not genuinely narrow the class of persons eligible for the death penalty. *See Zant v. Stephens,* 462 U.S. 862, 877 (1982).

The Florida Supreme Court has held that § 921.141(5)(i) requires a "heightened" level of premeditation and, therefore, does narrow the class of persons eligible for the death penalty. In *Jent v. State,* 408 So.2d 1024 (Fla. 1981), cert. denied 457 U.S. 1111 (1982), the Court held that "the level of premeditation needed to convict in...a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i)." *Id.* at 1032. *See also Card v. State,* 453 So.2d 17, 23 (Fla. 1984), *cert. denied* 469 U.S. 989 (1985) ("premeditation must rise to a level beyond that which is required for a first degree murder conviction"). In *Brown v. State,* 473 So.2d 1260 (Fla. 1985) *cert. denied* 474 U.S. 1038 (1985), the court held that "[T]he factor places a limitation on the use of premeditation as an aggravating circumstance in the absence of some quality setting the crime apart from mere ordinarily premeditated murder." *Id.* at 1268. *See Combs v. State,* 403 So.2d 418, 421 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). The Eleventh Circuit Court of Appeals *en banc* has held that, given these limiting instructions, § 921.141(5)(i) sufficiently narrows the class of defendants eligible for the death penalty. *Harich v. Dugger,* 844 F.2d 1464, 1468-69 (11th Cir. 1988) (en banc) (specifically adopting relevant portions of the panel opinion in *Harich v.*

Wainwright, 813 F.2d 1082, 1101-04 (11th Cir. 1987). Subsection (5) (i) is therefore, not unconstitutional on its face.

The Petitioner further contends, however, that this aggravating circumstance has been inconsistently applied by the Florida Courts. This same argument was rejected in *Harich v. Dugger,* 844 F.2d 1464, 1468-69 (11th Cir. 1988) *(en banc).* The Court finds the Petitioner's arguments in this respect similarly unpersuasive. "[W]hile the line between 'ordinary' premeditation and the 'heightened' cold, calculated premeditation is a thin one, petitioner has not shown that the state has applied this factor in an unconstitutionally arbitrary manner." 813 F.2d at 1103. *See Harich v. Dugger,* 844 F.2d 1464, 1468-69 (11th Cir. 1988) *(en banc).* Moreover, the Court agrees with the Florida Supreme Court that the facts of this case are sufficient to show the heightened premeditation required for the application of subsection (5)(i). *Gore v. State,* 475 So.2d 1205, 1211 (Fla. 1985).

Accordingly, this claim is DENIED.

VI

Petitioner seeks relief on the basis that defense counsel was improperly restricted in making his closing argument in the penalty phase of the case.

Petitioner was prosecuted for first degree murder under two theories: premeditated murder and felony murder. During the closing arguments following the penalty phase, Petitioner's counsel sought to argue that if the jury believed that Petitioner's codefendant, Freddy Waterfield, had committed the murder and that Petitioner's conviction was based on felony murder, then the aggravating factors that

the capital murder was heinous, atrocious, or cruel and cold, calculated, and premeditated did not apply to Petitioner.[11]

A conviction based on felony murder when the defendant was not the triggerman would not, as a matter of Florida law, preclude the jury from considering these two aggravating factors during the sentencing phase. The State properly points out that the legal threshold to apply an aggravating factor is the defendant's conviction of a capital felony as opposed to the defendant's actual role in the crime. Defense counsel erroneously sought to argue that heinous and cruel, cold and calculated could only apply in the instance that the defendant did the actual killing. The Court properly prevented counsel from making that argument.[12] *United*

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11 Petitioner's counsel stated:

> if any of you decided that David Gore...was guilty of first-degree murder because Freddy had done it and that was felony murder...I submit to you that these aggravating circumstances that Mr. Stone is arguing for, many of of them don't apply.

(R.3222-26). F.S.A. § 921.141(5)(h) and (i) list the two aggravating factors that Petitioner argued did not apply:

> (h) The capital felony was especially heinous, atrocious, or cruel.
> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

12 The judge did point out that defense counsel could argue that the facts did not support finding that aggravating factor:

> I'll permit you to argue that the crime was not committed in a cold, calculated, way...and it's not an aggravating circumstance; but I will not permit you to argue that simply because Mr. Waterfield did the killing, that is not an aggravating circumstance.

(R.3225) [and in the same conversation the Court also stated]

> I think you can argue that the fact it may not be premeditated, the fact that somebody else did the shooting...

(R.3224).

States v. Trujillo, 714 F.2d 102 (11th Cir. 1983). Hence, the trial court did not deny Petitioner's Sixth, Eighth, or Fourteenth Amendment rights by restricting his closing argument.

Accordingly, this claim is DENIED.

VII

In his seventh claim, Petitioner asserts that his right to an impartial jury under the Sixth Amendment and the Florida Constitution was violated because the trial court allegedly prevented Petitioner's counsel from engaging in adequate voir dire examination of the jury panel. During voir dire, Petitioner's counsel sought to ascertain whether any juror possessed such a predisposition toward the death penalty that he or she would be unable to recommend life if Petitioner was found guilty of first degree murder. Defense counsel asked:

> Concerning the death penalty, is there someone here that feels so strongly in favor of the death penalty that you would never under any circumstances be able to recommend mercy in a case in which the defendant was convicted of first degree murder?

(R. 1595). The Court sustained the State's objection to that question on the grounds that "mercy" was not referred to in the death penalty statute.

Though sustaining the State's objection may have been incorrect under Florida law, the trial court's action did not

prejudice defendant's right to an impartial jury.[13] The Sixth Amendment limits the State's power to exclude jurors based on their views about capital punishment. However, a juror may be excluded for cause if his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526 (1980). Indeed, "[t]he State may insist...that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Id. See also Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844 (1985). The record here clearly shows that the Court inquired of the prospective jurors whether they had any bias or prejudice which could prevent them from being impartial or from following the Court's instructions. (R.1497-1502). Although the trial court did not allow defense counsel to use the term "mercy," the court did not foreclose counsel from asking jurors whether, given a guilty verdict, "they cannot render an advisory opinion back to this Court with reference to life

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13 The Supreme Court of Florida decided in Petitioner's appeal that pursuant to Florida law defense counsel should have been permitted to ask the jurors whether they could have recommended mercy. *Gore v. State,* 475 So.2d 1205, 1207 (Fla. 1985). However, the Court also found that the trial court's sustaining the state's objection "was harmless error beyond a reasonable doubt." *Id.* There was no showing of prejudice to the defendant because

> The jury was thoroughly questioned in regard to their attitudes toward the death penalty and whether they felt it should be automatically imposed or whether they would follow the court's instructions and make sure the circumstances were proved to support it before they would consider it.

imprisonment not to exceed twenty-five years." (R.1596).[14] Overall, the record demonstrates that the subject of predisposition in favor of the death penalty was adequately addressed and that Petitioner's Sixth Amendment right to an impartial jury and an adequate voir dire were not violated. Both the judge as well as counsel for both sides took great pains to ascertain whether the jury could fulfill its duty abide by the law and render an impartial verdict and sentence.

Accordingly, this claim is DENIED.

VIII

Petitioner's eighth claim concerns two incidents during which the trial court allegedly prevented defense counsel from presenting exculpatory testimony. In reviewing both instances, the Court does not find the Petitioner's Sixth Amendment right to confront witnesses or present evidence was violated.

First, Petitioner asserts that the trial court violated his right to present witnesses when it barred defense counsel from presenting a witness to impeach the testimony of

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14 At the conclusion of the bench conference following the objection to the use of the term "mercy," the Court told the jury:

> The bottom line is that you would follow the instructions of the law that will govern this case, and with that law and the evidence base your decision only on the law and the evidence.
>
> In other words, is there anyone that would not follow the law in this case. I know the reservations that some of you have about the capital death penalty, and we're going to get into that, but with those reservations, is there anyone that would not follow the Florida law that governs this case and that you would be instructed by me as the judge in this case with the reservations of those individuals as to capital punishment?

(R.1596-97).

Michael Rock. Mr. Rock testified that he saw Petitioner shoot the victim. Defense counsel asked Mr. Rock in his cross examination whether Rock recalled "telling Detective Pisani that you couldn't see his face?" To which Rock replied, "Well I told him I couldn't see his whole face, but part. I only saw part of it, but I told him I didn't see his whole face." (R.1994-95). Defense counsel then sought to impeach Mr. Rock by having Detective Pisani testify: "I asked [Rock] did he have a mustache and I said 'Do you know?' Rock responds, "I really couldn't see his face 'cause he kind of held it down." The trial court barred this testimony pursuant to Florida Rule of Evidence § 90.614(2) because defense counsel had failed to lay a proper predicate for the introduction of impeachment testimony. (R.2660-64).

Florida Rule of Evidence § 90.614(2) requires:

> Extrinisic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it...

The Court agrees with the State that defense counsel could very easily have asked Rock if he had told Detective Pisani "I really couldn't see his face cause he held it down." Here, defense counsel did not fully and accurately quote the prior, allegedly inconsistent statement to the witness during cross examination and did not fulfill the prerequisite of the rule for subsequent presentation of the impeachment testimony. Moreover, the statement made by the witness during cross examination was not materially different from the earlier statement in the sense that the witness admitted that his view of the Petitioner's face was impaired.

Second, defense counsel sought to introduce exculpatory statements allegedly made by Willie Webb who lived next

door to the place where the victim was shot. The statements were made to Dorothy Stokes. Webb is alleged to have said that he heard a scream and shots, then immediately saw Waterfield come around the corner in his truck, jump out and run into Webb's yard with a gun in his waistband. The trial court refused to let Ms. Stokes testify to Webb's statements on the basis that the statements did not qualify as an excited utterance exception to the hearsay rule. This was nothing more than an evidentiary ruling which was not clearly wrong, and the Court does not find any constitutional infirmity in that ruling.

Accordingly, this claim is DENIED.

IX

In his ninth claim, Petitioner argues that his sentence must be overturned because the court allowed the State to introduce evidence of non-statutory aggravating factors at Petitioner's capital sentencing proceeding.

Four months prior to his conviction in this case, Petitioner had been serving a prison sentence for an earlier conviction of the offense of armed trespass. This conviction was based on Petitioner's entering into a woman's car and hiding in the back seat with a loaded .357 magnum and a pair of handcuffs. Petitioner's prior imprisonment was made known to the jury. However, the jury was not told the reason for that imprisonment. (R.3070-3073). The trial court had previously ruled that armed trespass did not qualify as an aggravating circumstance.

The first reference to the trespass later arose when Petitioner's mother testified about Petitioner's character and his religious conversion while he was in prison on the prior charge. This effectively "opened the door" and, on cross examination, the State questioned Petitioner's mother

about the circumstances of the trespass since she had testified that Petitioner was "not capable of doing this" and that she had "never worried from day one until now" that her son would get into such trouble. Petitioner's mother admitted that he had been sent to prison for crouching in the back of a woman's car with a gun and handcuffs. (R.3154-55). The State later referred to this incident in its closing argument when it questioned whether Petitioner's alleged religious conversion was sincere in light of his past behavior. (R.3213).

Petitioner contends that the two references to the armed trespass unlawfully introduced the aggravating circumstance of a prior conviction of a felony involving the use or threat of violence. F.S.A. 921.141(5)(b).

The references to the circumstances surrounding the armed trespass do not qualify as error, much less constitutional error. The State never argued that this prior incident constituted an aggravating circumstance. Rather, the prosecutor told the jury:

> I submit to you that was a response to a comment about the character of the defendant in this case. What happened after he got out of prison and had been born again the first time? [referring to the murder] Within four months — within four months after he had been born again in prison and got out, that's what happened.
>
> I submit to you that you can consider that in determining whether or not the defendant's character is an aspect in mitigation of the aggravating circumstances that have been proven here beyond a reasonable doubt.

R. 3215-16. Hence, the references to the circumstances of the trespass simply addressed the issue of Petitioner's character in rebuttal of his argument that he had undergone

a religious conversion. Moreover, the jury was instructed that it could consider only five aggravating circumstances. Those five did not include a prior felony involving threat or use of violence.

Accordingly, this claim is DENIED.

X

Petitioner's tenth claim is that he was deprived of reliable and individualized sentencing procedure. Here, Petitioner argues that the judge imposed sentence after the jury's verdict without mentioning any statutory or nonstatutory mitigating circumstances, and that the trial court had not engaged in the required balancing process. Instead, Petitioner contends that the trial court sought after the fact to bolster its sentence by providing written findings which in part varied from the trial court's oral comments at sentencing.

Petitioner's claim is procedurally barred due to his failure to argue it on appeal. Petitioner has not demonstrated sufficient cause for his failure to raise the issue on appeal nor has he demonstrated any actual prejudice. Even if the claim were not barred, the trial court's action in sentencing the Petitioner and its later submission of written findings supporting that sentence does not raise a constitutional issue. It is clear that the trial court made a considered judgment in imposing the death penalty. The judge referred to the jury's 11-1 vote in favor of death, and identified several aggravating circumstances in imposing the sentence. Moreover, the basis of the sentence was thoroughly discussed and supported by specific findings which the Court later submitted as required by Florida statute § 921.141(3).

Petitioner's allegation of prejudice and an unreliable sentence is without merit.

Accordingly, this claim is DENIED.

XI

Petitioner's eleventh claim is that he was denied a reliable sentencing proceeding in violation of *Booth v. Maryland,* 107 S.Ct. 2529 (1987), and the Eighth and Fourteenth Amendments, when the state urged that he be sentenced to death on the basis of impermissible "victim impact" evidence. Petitioner asserts that, contrary to the rule established in *Booth,* both the jury and the judge may have considered inappropriate victim impact evidence in arriving at their decisions to recommend and impose, respectively, the death penalty.

Booth involved a Maryland statute which required that a presentence report containing a "victim impact statement" be considered in all felony cases. The statement was designed to detail the effect that the crime had on the victim and his or her family. The Supreme Court held that the presentation of such information to a capital sentencing jury violates the Eighth Amendment because it creates a constitutionally unacceptable risk that the jury might impose the death penalty in an arbitrary and capricious manner. *Id.* at 2533.

The victim impact statement provided to the jury in *Booth* contained two types of information. It first described the personal characteristics of the victims and the emotional impact of the crimes on their family, and second, it set forth the family members' opinions and characterizations of the crimes and defendant. *Id.* Included in the impact statement presented to the jury were family members' comments regarding the serious emotional problems they suffered as

a result of the crimes, family members' perception of the crimes, including the victims' son's opinion that his parents had been "butchered like animals," and the family members' beliefs that the defendants could "never be rehabilitated." *Id.* at 2531.

In noting that "any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion,'" *Id.* at 2536 *quoting Gardner v. Florida,* 97 S.Ct 1197, 1204 (1977), the Court stated that there is no "justification for permittig such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." *Booth,* 107 S.Ct.at 2534. Thus, the Court vacated Booth's death sentence because it concluded that the family members' opinions and characterizations of the crimes "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.* at 2536.

Upon review of the record in this case, the Court concludes that a material difference exists between the detailed victim impact statements presented to the jury in *Booth* and the references made to the victim's family here. In this case during voir dire examination of the venire, the prosecutor, in the context of stressing that sympathy cannot play a role in the jury's deliberations, made reference to the fact that although members of the Petitioner's family might testify during the penalty phase (if the Petitioner were ultimately convicted), the parents of the victim would not be permitted to testify. Additionally, at the sentencing phase the prosecutor, in response to the introduction of childhood photographs of the Petitioner, made passing reference to the fact that he could not introduce similar photographs of the victim. Unlike the situation in *Booth,* there were no comments from family members regarding either their emotional problems, their perceptions of the crime, their beliefs

about the Petitioner, or the personal characteristics of the victim. Indeed, the prosecutor did not dwell on any impact the crime had on the victims or their families. His comments simply pointed out the self-evidence fact that these teenage victims did have families in the context of arguing that sympathy for any party, victim or Petitioner, should not enter into the jury's consideration. The Court, therefore, concludes that the prosecutor's statements did not create the risk that the Petitioner's death sentence was based on considerations that are "constitutionally impermissible or totally irrelevant to the capital sentencing process." *Id.* at 2533 (citations omitted).

Petitioner also contends that the trial judge considered inappropriate victim impact evidence when imposing sentence. Petitioner points out that when the judge orally imposed sentence, he mentioned the suffering and torture felt by the surviving victim, Regan Martin. These comments were discussed in the context of the statutory aggravating circumstances that the murder was committed while the Petitioner was engaged in committing other felonies — kidnapping and sexual battery — and that the murder was especially heinous, atrocious and cruel. These comments by the judge clearly fail to offer any support for Petitioner's *Booth* claim.

Accordingly, this claim is DENIED.

XII

Petitioner asserts that the trial court's instructions to the jury during the penalty phase of Petitioner's trial violated his constitutional rights by shifting the burden of proof from the State to him. The relevant instructions given by the trial court are as follows:

THE COURT: ...[I]t is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

* * * *

Now, should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

* * * *

Now, if one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

Now, a mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

Now, the sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

(R.3231-34).

Petitioner contends that these instructions impermissibly shifted the burden of proof to him in violation of *Mullaney v. Wilbur,* 421 U.S. 684 (1975) and violated his due process and Eighth Amendment rights to a fundamentally fair and reliable sentencing determination.

Petitioner's claims is without merit. The United States Supreme Court has previously declared Florida's capital sentencing procedure, including its weighing of aggravating and mitigating circumstances, to be constitutional on its face. *Id.* As the Supreme Court stated:

> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 96 S.Ct. 2960, 2969 (1976). The instructions given by the trial court in this case track the language of the statute found facially constitutional in *Proffitt.* The statute as applied by the trial court in its instructions thus did not violate Petitioner's due process rights; and more specifically, did not shift the burden of proof to him.

Accordingly, this claim is DENIED.

XIII

Petitioner asserts that he was denied effective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments.

The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington,* 104 S.Ct. 2052, 2064 (1984). The basic standard for judging a claim that an attorney has not provided constitutionally adequate assistance is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* Accordingly, a petitioner seeking relief on a claim of ineffective assistance, such as the one presented here, has the burden of showing (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* Each of these requirements was explained further in *Strickland v. Washington* to involve the following considerations.

The criterion for evaluation of attorney performance is that of *reasonably* effective assistance. The standard of reasonableness is an objective one which may be measured by using prevailing professional norms as guidelines; however, a court must be highly deferential when evaluating the performance of defense counsel and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 2065-66. Every effort should be made "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 2065. Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 2066. Further, the Court of Appeals has reiterated that effective assistance does not mean errorless assistance, and that an attorney's performance is to be judged on the totality of circumstances in the entire record rather than on specific actions. *Green v. Zant,* 738 F.2d 1529, 1536 (11th Cir.), *cert. denied* 105 S.Ct. 67 (1984).

Even if defense counsel's performance was deficient, a petitioner asserting a claim of ineffective assistance must show that the deficiencies were prejudicial to his defense. This requires "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 104 S.Ct. at 2068.

In this case, Petitioner asserts that his trial counsel rendered ineffective assistance because he failed to present evidence concerning, and to request an instruction on, the issue of Petitioner's voluntary intoxication which, if proven to the jury, would have negated the specific intent necessary to convict Petitioner of the crimes with which he was charged. At the Petititioner's Rule 3.850 hearing in state court Mr. Kendall Phillips, Petitioner's trial counsel, testified that he and co-counsel James Long investigated and considered presenting a defense based on Petitioner's intoxication but ultimately rejected pursuing such a strategy. (EH 658, 661, 668). Mr. Phillips testified that the intoxication defense was rejected both because it was factually very weak and because he thought it would be inconsistent with Petitioner's main defense, factual innocence based on misidentification.[15] Mr. Phillips stated that he thought he would lose credibility with the jury if he were to present both defenses. (EH 658).

Upon review of the record the Court cannot say that by failing to pursue an intoxication defense, counsels' performance fell outside the range of professionally competent assistance. As counsel pointed out during his testimony, the

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15 Mr. Long gave similar testimony at the state Rule 3.850 hearing, stating that counsel had spent many hours talking with Petitioner's family about his history and that counsel rejected presenting an intoxication defense because they believed the identity defense was stronger. (EH. 567, 601).

intoxication defense was weak as there was no direct evidence that Petitioner had been drinking or using drugs on the day of the offense.[16] To be sure, as discussed with respect to claim I, there was some circumstantial evidence — the bottle of vodka, the opened bottle of pills and family members' impressions — that would lend credence to an intoxication theory. However, there was also evidence from law enforcement personnel that after his arrest the Petitioner did not appear to be under the influence of either alcohol or drugs. (R.2504, Testimony of Detective Sidney DuBose). Additionally, although Petitioner is correct that the misidentification and intoxication defenses are not strictly inconsistent, counsel's belief that he would lose credibility with the jury if he were to argue both that his client was innocent but that, if he were guilty, his guilt should be at least partially excused, is not unreasonable and strategic choice not to pursue both defenses does not render his assistance ineffective.

Further, even if the Court concluded that competent counsel would have pursued an intoxication defense, the Petitioner's claim of ineffective assistance would still be unavailing because he has failed to demonstrate that there is a reasonable probability that assertion of the defense would have changed the outcome of the case. *See Strickland,* 104 S.Ct. at 2068; *Harich v. Dugger,* 844 F.2d 1464, 1471 (11th Cir. 1988). Not only was there no direct evidence of intoxication but the circumstantial evidence was not extremely strong and the inference of intoxication Petitioner hoped to draw from it was disputed by the observations of law enforcement personnel. Further, as described by Regan

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16 Petitioner did not testify at either the guilt phase or the sentencing phase and no allegation is made that the decision to keep him off the witness stand was erroneous or constituted ineffective assistance of counsel and, from the record, no such claim could be sustained.

Martin, the surviving victim, the Petitioner's course of conduct over the hours the kidnappings, sexual assaults and murder took place disclosed that he directed the commission of the offenses. This testimony would have directly contradicted Petitioner's claim that he was so intoxicated that he was unable to form the specific intent necessary to be found guilty of the crimes charged. Petitioner, therefore, has failed to meet his burden of demonstrating that he was constitutionally prejudiced by counsel's failure to pursue an intoxication defense.

Accordingly, this claim is DENIED.

XIV

Petitioner asserts that he was deprived of his due process rights, his right to a fair trial and his right to confrontation in violation of the Sixth, Eighth and Fourteenth Amendments due to the State's failure to comply with state discovery rules. Petitioner alleges that the State failed to comply with state discovery rule 3.220(a)(1)(vi), Fla. R. Crim. P., because it did not list the fact that three rounds of ammunition were found in Petitioner's pants pocket. Petitioner claims that this omission prejudiced him when the State improperly introduced the ammunition into evidence over his objection.

This claim is without merit. An alleged violation of state law is cognizable in a § 2254 petition only if some federal right has also been impinged. Petitioner has shown no such federal right was violated in this case. Petitioner had been given notice of the presence of the ammunition well prior to trial because its existence was noted during the deposition testimony of Mr. Daniel Nippes, criminalist with the regional crime laboratory. (R.2467-68). Additionally, the evidence was available for inspection by counsel for some time prior to trial. (R.2472). The Court, therefore, cannot say

that Petitioner's due process rights, his rights to a fair trial or his right to confrontation were compromised by the State's failure to list the ammunition as may be required by state rules.

Accordingly, this claim is DENIED.

XV

Petitioner's fifteenth claim for relief is predicated upon *Caldwell v. Mississippi,* 105 S.Ct. 2633 (1985), in which the Supreme Court held that it is constitutionally impermissible under the Eighth and Fourteenth Amendments for a state to rest a death sentence on a determination made by a sentencing jury which has been led to believe that ultimate responsibility for determining the appropriateness of the defendant's death rested elsewhere. As this claim was not raised at trial or on direct appeal, it is procedurally barred. The Court can review the merits of the *Caldwell* claim only if the Petitioner can demonstrate sufficient cause and prejudice to excuse his failure to raise this issue on appeal. *Wainwright v. Sykes,* 433 U.S. 72 (1977). Petitioner is foreclosed from showing the requisite "cause," however by the Supreme Court's recent decision in *Dugger v. Adams,* 3 FLW Fed. 5105 (February 28, 1989). Adams held that the Court's intervening decision in *Caldwell* does not provide cause to a Florida defendant for a procedural default because the claims could have been raised during trial under then existing state law. As the Supreme Court explained in *Adams:*

> [W]hat is determinative in this case is that the ground for challenging the trial judge's instructions — that they were objectionable under state law — was a necessary element of the subsequently available *Caldwell* claim. In such a case,

> the subsequently available federal claim does not excuse the procedural default.

Id., slip op. at 9. Petitioner's *Caldwell* claim is thus procedurally defaulted and the default is not excused under the cause and prejudice standard set out in *Sykes.*

Accordingly, this claim is DENIED.

XVI

Petitioner contends that his death sentence rests upon an unconstitutional automatic aggravating circumstance, in violation of *Lowenfield v. Phelps,* 108 S.Ct. 546 (1988), and the Eighth and Fourteenth Amendments. More particularly, the Petitioner contends that it is unclear from the general verdict form whether the conviction was for killing with a premeditated design pursuant to Fla. Stat. 782.04(1)(a)(1) or pursuant to the felony murder provision at Fla. Stat. § 782.04(1)(a)(2). The Petitioner argues that if the jury rendered a verdict of guilty of murder in the first degree on the basis of the felony murder statute, then a finding of the aggravating factor set forth in Fla. Stat. § 921.141(5)(d) (that the crime for which the defendant is (sic) be sentenced was committed while the defendant was engaged in the commission of, *inter alia,* sexual battery or kidnapping) was "automatic" at the penalty phase in violation of *Lowenfield.* This argument is without merit.

In *Lowenfield,* the petitioner was found guilty of three counts of first degree murder pursuant to a Louisiana statute which defined the crime as occurring when: "[T]he offender has a specific intent to kill or to inflict great bodily harm upon more than one person." *Id.* at 554 *quoting* La.Rev.Stat.Ann § 14:30.A(3). The only aggravating factor found by the jury was that "the offender knowingly created a risk of death or great bodily harm to more than one

person." *Id. quoting* La.CodeCrim.Proc.Ann.Art. 905.4(d). Petitioner contended that his death sentence violated the Eighth Amendment because the sole aggravating factor found merely duplicated an element of the underlying offense of which he was convicted. *Id.* at 548.

In rejecting the petitioner's contention the Supreme Court held that the parallel nature of the aggravating circumstance did not render the sentence infirm because the constitutionally mandated narrowing of the class of death-eligible persons was performed at the guilt phase under Louisiana's statutory scheme. The Constitution, therefore, did not require an additional aggravating circumstance to be found at the penalty phase to channel the jury's discretion. *Id.* at 554.

In Florida, unlike Louisiana, the required narrowing of death-eligible persons occurs during the sentencing phase through the weighing of aggravating and mitigating factors. Here, in the Order entered August 20, 1984, the trial judge specifically found the existence of five statutory aggravating circumstances and that no mitigating circumstances existed. (R. 854A-G, Order of Judge L.B. Vocelle, August 20, 1984). On appeal, the Florida Supreme Court rejected all of Petitioner's challenges to his sentence, including numerous challenges to individual aggravating circumstances, and held that the death penalty was proportionately warranted in this case. *Gore v. State,* 475 So.2d 1205, 1211 (Fla. 1985).

Based on the fact that the trial court found four aggravating circumstances independent of that claimed to be "automatic" by Petitioner, and the Court's own review of the record, there is no question that the penalty phase of this trial "genuinely narrow[ed] the class of persons eligible for the death penalty and...reasonably justif[ied] the imposition of more severe sentence on the defendant as compared to others found guilty of murder." *Zant v. Stephens,* 103 S.Ct.

2733, 2742 (1983). *Lowenfield v. Phelps,* adds nothing to the Petitioner's argument and simply does not support it.

Accordingly, this claim for relief is DENIED.

XVII

In his final claim Petitioner contends that he was denied the due process guarantees of an impartial jury and a verdict based solely on the evidence adduced at trial in violation of the Sixth, Eighth, and Fourteenth Amendments due to an outburst by an epileptic juror which interrupted defense counsel's closing argument. At the time, defense counsel reported to the trial judge that he had heard the juror laughingly exclaim during his seizure "goddam you" two or three times. (R.2856-7). After taking a brief recess during which the trial judge denied Petitioner's motion for mistrial, the epileptic juror was excused and an alternate juror seated in his place. The judge then gave the following explanatory and curative instruction:

> **THE COURT:** Ladies and gentlemen of the jury, we are concerned about Mr. Brown's health. Under the circumstances I am excusing Mr. Brown so that he can go about his own personal affairs and I believe we do have someone in attendance with him.
>
> * * * *
>
> Ladies and gentlemen, any outburst that Mr. Brown made or may not have made — I did not hear — but I want to state to you, as I've stated to you from the very beginning, this case must be tried solely on the evidence on the law and nothing else.
>
> * * * *

> Can each of you assure me that you will make your decision in this case solely on the law and nothing else?
>
> Is there anything that Mr. Brown has stated that would in any way influence this jury and carry any comments he may or may not have said into the jury room?
>
> All right. We're sorry for the interruption of the defense's argument. Mr. Phillips, you may proceed.

(R.2864-66).

Upon review of the record, the Court concludes that the brief and unfortunate outburst by the epileptic juror in the throes of a seizure did not undermine "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana,* 85 S.Ct. 546, 549 (1965). The juror was excused and any potential confusion felt by the jury after the jurors's outbrust was adequately remedied by the curative instruction given by the trial court immediately following the brief recess which had been taken in order to give the affected juror medical assistance.

Accordingly, this claim for relief is DENIED.

Upon due consideration, the Court has concluded that Petitioner's first claim for relief, the claim based on *Lockett v. Ohio,* and *Hitchcock v. Dugger,* is meritorious and that Petitioner has demonstrated that his death sentence was imposed in violation of the Eighth Amendment of the Constitution of the United States.

The petition for a writ of habeas corpus is GRANTED. Unless the State within 120 days resentences the Petitioner in a proceeding that comports with *Lockett* and *Hitchcock,* the Petitioner shall be resentenced to an appropriate

sentence less than death. With respect to all other claims, the petition is without merit and is denied.

A number of motions remain for the Court's consideration. Petitioner's motion for leave to proceed *in forma pauperis* is GRANTED. The motion for an extension of the Court's page limitation is GRANTED. The several motions to admit counsel pro hac vice are GRANTED.

The Clerk is directed to enter judgment in favor of Petitioner consistent with this memorandum opinion.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 17th day of August, 1989.

/s/_____
UNITED STATES DISTRICT JUDGE

DAVID ALAN GORE,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent.

DAVID ALAN GORE,
Appellant,

v.

STATE of Florida,
Appellee.

Nos. 72202, 72300

Supreme Court of Florida.

August 18, 1988

Rehearing Denied Nov. 23. 1988.

Defendant was convicted of first-degree murder, kidnapping, and three counts of sexual battery. The Circuit Court, Pinellas County, L.B. Vocelle, J., denied defendant's motion for postconviction relief. Defendant appealed the denial of that motion and petitioned for writ of habeas corpus. The Supreme Court held that defendant was not deprived of opportunity of presenting pertinent nonstatutory

mitigating evidence during penalty phase of trial by omissions of counsel.

Order denying postconviction relief affirmed; petition for habeas corpus denied.

Larry Helm Spalding, Capital Collateral Representative and Billy H. Nolas and Judith J. Dougherty, Office of the Capital Collateral Representative, Tallahassee, and Jerome H. Nickerson, Wheaton, Md., for petitioner-appellant.

Robert A. Butterworth, Atty. Gen., and Robert S. Jaegers, Georgina Jimenez-Orosa and Carolyn V. McCann, Asst. Attys. Gen., West Palm Beach, for respondent-appellee.

PER CURIAM.

This is a petition of David Alan Gore for a writ of habeas corpus seeking to set aside his death sentence and an appeal from the denial of a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, §§ 3(b)(1),(9), Fla. Const. In order to give adequate consideration to the issues involved, this Court stayed Gore's impending execution. We now conclude that Gore is entitled to no relief.

Gore was convicted of the first-degree murder of Lynn Elliott, the kidnapping of Elliott, the kidnapping of Regan Martin, and three counts of the sexual battery of Regan Martin. Following a jury recommendation of death, the trial judge imposed the death sentence for the murder of Elliott and life sentences for the other crimes. This Court affirmed in *Gore v. State,* 475 So.2d 1205 (Fla. 1985), *cert. denied,* 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986).

The crimes were described in our opinion as follows:

> Gore and his cousin picked up fourteen-year-old Regan Martin and seventeen-year-old Lynn

Elliott who were hitchhiking to the beach. After the glove compartment in the pickup truck fell open and a gun became visible, Gore took the gun and held it to Regan's head. He grabbed the two girls' wrists and held them together. Gore then said that they should take the girls to Gore's home. He told the girls that if they said or did anything, they would be killed. When they arrived at his home, the girls were handcuffed and taken into a bedroom. The girls then were separated, and Lynn was tied up while Regan was handcuffed. Gore cut Regan's clothes off of her and sexually assaulted her on three separate occasions. Regan testified that she heard noises in the other room after Gore had left her. She heard Gore tell Lynn to shut up or he would kill her. Gore also told Regan to be quiet or he would slit her throat and that he would do it anyway. Gore then put Regan in the closet, and, after he left, she heard two or three shots. Gore then came back into the room and put Regan in the attic where she stayed until rescued by a police officer.

Michael Rock, a fifteen-year-old boy, testified that on July 26, 1983, while riding his bicycle in the area of Gore's home, he heard screaming and observed a naked girl running down the driveway being chased by Gore who was also naked. He saw Gore catch up to her, drag her back to a palm tree, and shoot her twice in the head. Rock went home and told his mother, and she called the police. The police arrived and surrounded Gore's home. Lynn's body was found in the trunk of the car in the driveway. Her arms and legs had been tightly bound with rope. She had multiple abrasions on her body consistent with falling and being

dragged. The gun used to kill her was found in Gore's home.

Id. at 1206.

Gore raises a number of points, but we only find it necessary to discuss one of them. In both his petition and his appeal, Gore claims that because of omissions of counsel, he was deprived of the opportunity of presenting pertinent nonstatutory mitigating evidence during the penalty phase of his trial.

At the charge conference which preceded the testimony at the penalty phase, Gore's counsel said that he planned to have Gore's brother-in-law testify that Gore was acting strangely the weekend before the killing and that after the crime he had found a half empty bottle of vodka and some pills in Gore's bedroom. He intended for this witness and Gore's mother and father to say that because of the way he was acting, they believed that he was drinking. The judge deemed this irrelevant because there was no evidence that Gore was drinking while the women were in his custody, and Martin testified that he did not appear drunk. At the postconviction hearing, Gore's father, uncle and brother-in-law testified that Gore was usually quiet, but when he drank his personality changed and he would become very talkative. The brother-in-law said that when he had had dinner with Gore the night before the murder, Gore was at first talkative but later became quiet and appeared nervous. He said that Gore did not take a drink in his presence. Gore's uncle said that Gore seemed to be acting strangely the night before the crime.

From an examination of the record, it appears that to the extent that evidence was available concerning the possibility of drinking, Gore's trial counsel sought to have it introduced. The trial judge sustained the state's objection based on relevancy. Hence, trial counsel cannot be faulted

for failing to present the evidence. On appeal, Gore's appellate counsel asserted in point XVIII of the brief that the judge had erred in refusing to permit evidence concerning the possibility of drinking. While this issue is not specifically mentioned in the opinion, this Court denied all of Gore's assertions. Hence, it is evident that neither counsel was ineffective.

In the penalty phase of the trial, Gore's attorney also sought to have Gore's mother testify concerning the close relationship between her son and his cousin, Freddie Waterfield, who accompanied Gore when they picked up Elliott and Martin on the highway. Gore's mother was prepared to say that they had been close friends most of their lives and that because of Waterfield's dominating personality, he had a strong influence on Gore's conduct. The trial judge sustained the state's objection to this testimony on grounds of relevancy. At the postconviction hearing, other relatives also testified of Waterfield's influence upon Gore.

It is likewise clear that Gore's trial counsel tried to introduce evidence on the subject of Waterfield's dominance during the penalty phase but was prevented from doing so by the ruling of the trial court. Under these circumstances, there was nothing more that trial counsel could do. The state suggests that appellate counsel also asserted this ruling as error in the appeal. While it is true that there is an oblique reference to the subject in Gore's appellate brief, it cannot be fairly said that this issue was squarely raised on appeal. Hence, it is necessary to further consider the claim of ineffectiveness directed toward appellate counsel on this issue.

It is evident that the reason the trial judge would not permit testimony concerning the influence of Waterfield upon Gore was because there was no evidence that Waterfield had anything to do with Gore's killing of Elliott. According to the testimony of the surviving victim, Martin,

it was Gore who took the gun out of the glove compartment of the truck, put it to her head and then grabbed her wrist along with Elliott's wrist and held them together. Martin further testified that it was Gore who suggested that Waterfield drive them home "to have a little fun with them," that Gore threatened to kill them, handcuffed their wrists together, and did all the talking and gave the orders. Gore was the only person she ever saw holding the gun and the one who sexually assaulted her. She said she was pretty sure that Waterfield had left when they were brought to the house. She did not see Waterfield or anyone else besides Gore in the house and only heard Gore's voice after they were brought inside. Michael Rock, the eyewitness to the shooting, said that the man who chased Elliott and killed her was Gore. Thus, even if it were shown that Waterfield had the ability to influence Gore, the evidence would not have supported the statutory mitigating circumstance of substantial domination of another person. *See Hill v. State,* 515 So.2d 176 (Fla. 1987), *cert. denied,* ___ U.S. ___, 108 S.Ct. 1302, 99 L.Ed.2d 512. (1988).

Gore argues, however, that the testimony was admissible as nonstatutory mitigating evidence pertaining to an aspect of his character. Thus in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court held that "the sentencer...[must not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 98 S.Ct. at 2964-65 (emphasis in original) (footnote omitted). While the evidence in question had minimal relevance to the offense, we cannot say that it was totally unrelated to his character. Gore should have been permitted to introduce such evidence for whatever weight it might be given. Therefore, it becomes necessary to evaluate the claim of ineffectiveness of counsel by applying the two-prong test

of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In this respect, we find it unnecessary to decide whether appellate counsel was ineffective for not making the argument on appeal because we are convinced that Gore has failed to show the requisite prejudice resulting from the alleged substandard performance. In evaluating the ineffectiveness of counsel as it relates to an attack on a death sentence, the United States Supreme Court in *Strickland* said:

> When a defendant challenges a death sentence...the question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstanes did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been...affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision

> reached would reasonably likely have been different absent the errors.

466 U.S. at 695-96, 104 S.Ct. at 2068-69.

Measured by this criteria, we cannot say that if the witnesses had been permitted to testify of Waterfield's influence over Gore that there is a reasonable probability that he would have received a life sentence rather than death. Recognizing that Waterfield played no part in this brutal killing and that there were five aggravating circumstances and no mitigating circumstances, the omission of this evidence would not have affected the outcome of this case.

We affirm the order denying postconviction relief, and we deny the petition for habeas corpus. We also vacate the stay of execution, although the prior death warrant has now expired.

It is so ordered.

ENRLICH, C.J., and OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur.